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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

NICOLE KENYON, Plaintiff and Appellant, v. JOEL FIGUEROA et al., Defendants and Respondents.	B159542 (Los Angeles County Super. Ct. Nos. KC034145, KC034198, KC034207)

APPEAL from a judgment of the Superior Court of Los Angeles County, Karl Jaeger, Judge. Affirmed.

DeWitt, Algorri & Algorri and Mark S. Algorri, for Plaintiff and Appellant.

Early, Maslach & Rudnicki and Priscilla Slocum; Law Offices of Roxanne Huddleston and Roxanne Huddleston, for Defendants and Respondents.

INTRODUCTION

In the underlying action, Nicole Kenyon sought to recover damages for her personal injuries sustained when she rear-ended a vehicle driven by Robert Louis Garavito. Among the defendants was Joel Figueroa,[1] whose truck had earlier been involved in a single-vehicle accident that produced smoke and debris in the area. The trial court resolved the case by summary judgment in favor of Figueroa on the ground Figueroa did not owe Kenyon a duty of care. Kenyon appealed arguing her accident with Garavito was a foreseeable consequence of Figueroa's accident. The undisputed facts, appearing in the filings for and against the Figueroa's summary judgment motion, showed that Kenyon was driving at 5 to 15 miles per hour above the speed limit and not paying attention when she hit Garavito's vehicle, some 50 yards beyond the smoke and at least two minutes after Figueroa's accident. On these facts, we conclude Figueroa owed Kenyon no duty of care with the result the trial court properly granted summary judgment. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 15, 1999, around 9:00 p.m., Figueroa was driving east on Badillo Street in the City of West Covina, when he was "cut off" by a Honda. Figueroa lost control of his vehicle which crossed the center divider and came to rest on the curb on the north (westbound) side of the street, crashing into either a traffic sign or a tree.

Sometime thereafter, Garavito made a right-hand turn from southbound Lark Ellen onto westbound Badillo. Lark Ellen is about 100 yards from the front of the Faith Community Church where the accident occurred. As Garavito turned onto Badillo, he noticed a cloud of smoke. Approaching the cloud of smoke, Garavito saw Figueroa's truck on his right, up on the curb. After he came out of the cloud of smoke and had

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[1] Also named as defendants are Christina Figueroa, the registered owner of the truck, and Ofelia Figueroa, included in the action for reasons that are not made clear in the record. On appeal, Kenyon does not challenge the judgment in favor of Christina and Ofelia, and so we need not address that portion of the judgment.

continued about 50 yards past Figueroa's accident, Garavito saw children coming out of the Faith Community Church running into Badillo Street. Garavito stopped his vehicle.

Garavito had been stopped about two minutes when Kenyon's car struck him from behind. There was still smoke in the air. Garavito testified he was looking into his rear view mirror and saw Kenyon's headlights about 75 to 100 yards away. Garavito estimated Kenyon's car was going 50 to 60 miles per hour. The speed limit on Badillo was 45 miles per hour. Garavito stated in his deposition that "when I stopped, I looked in my mirror to make sure that, you know, there was nobody coming on me -- and I seen the headlights were really small. And then seconds, within couple of seconds later, I looked in my mirror again. And then I seen that that car was right behind me, and it was already, you know -- by the time I turned my head, it hit . . . us."

According to Kenyon, she "was traveling down the street. There was a lot of smoke and debris and I started to slow because I couldn't see. And I was -- *and then it cleared and there was a car and I slammed . . . right into the car*." (Italics added.) The police report quoted Kenyon as stating "she wasn't paying attention" when she hit Garavito's vehicle.

After the case was at issue, Figueroa moved for summary judgment on the ground he did not owe a duty to Kenyon, and alternatively, if he did owe her a duty, his negligence was not the proximate cause of her injuries. Kenyon opposed the motion on the ground that duty is a question of fact and where facts were in dispute here, summary judgment could not be granted. The court disagreed and granted Figueroa's summary judgment motion ruling, as a matter of law, that Figueroa owed no duty to Kenyon. Kenyon's timely appeal followed.

CONTENTION

Kenyon contends the trial court erred in granting Figueroa's summary judgment motion.

DISCUSSION

1. *Standard of review*.

Summary judgment is properly granted when no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "We review the trial court's grant of summary judgment de novo, 'considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has "shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established," the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff "may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . ." ' [Citations.] Where the plaintiff fails to satisfy this burden, judgment in favor of the defendant shall be granted as a matter of law." (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014, citing Code Civ. Proc., § 437c, subd. (c).)

2. *Kenyon has demonstrated no triable factual issue*.

Kenyon attempted to dispute certain facts to show trial was required. Reviewing the proffered dispute, we conclude she has not demonstrated triable issues of material fact. First, Kenyon disputed Figueroa's fact he was cut off by a Honda, on the ground there was "[n]o proof by moving party." However, Figueroa presented his verified interrogatory answer, given under oath, and submitted with his moving papers under the authenticating declaration of his attorney, Sandra D. Carter. Hence, the fact was supported by declaration and answers to interrogatories (Code Civ. Proc., § 437c, subd. (b), first par.), and Kenyon does not create a dispute merely by stating there is no evidence.

Second, Kenyon sought to dispute the assertion that Garavito's vehicle had stopped beyond the cloud of smoke, by citing Garavito's deposition testimony that smoke

covered the whole street. Reading the testimony cited, Garavito stated both that (1) there was smoke "[a]nd/or dust that covered the whole street" where he "noticed [Figueroa's] truck to the right side;" and that he had "already passed the smoke about 50 yards past the truck that had hit the tree" when he saw the children running into the street. In fact, Kenyon herself testified "[t]here was a lot of smoke . . . *and then it cleared and there was* [*Garavito's*] *car* and I slammed . . . right into the car." (Italics added.) We perceive no dispute about the observed facts; the only reasonable inference from both Garavito's and Kenyon's testimony was that the smoke covered the entire street in the area where Figueroa's truck had come to a stop, but that the smoke cloud did not reach down Badillo Street as far as the Faith Community Church where Garavito had stopped.

Kenyon also objected to Garavito's estimate that Kenyon's speed was 50 to 60 miles per hour, on the ground it lacked foundation and was speculative. Yet, because she failed to obtain a ruling on her objection, she has waived it. (Code Civ. Proc., § 437c, subd. (b).)

Kenyon next stated she disputed Garavito's estimate he was stopped for two minutes before she rear-ended his car. However, the fact is supported by Garavito's deposition testimony (Code Civ. Proc., § 437c, subd. (b), first par.) and Kenyon failed to cite to any evidence to dispute that fact. Therefore, that fact remains undisputed.

Finally, through her additional proffered facts and by disputing Figueroa's fact 7, Kenyon attempted to demonstrate that Figueroa was intoxicated at the time of the accident. In support of this, Kenyon submitted the records of his no-contest plea. Kenyon's theory of the case is that Figueroa owed her a duty because her injury was foreseeable "as a consequence of Figueroa's negligent and intoxicated driving." Figueroa objected to the evidence of his no-contest plea pursuant to Penal Code section 1016,[2]

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[2] Penal Code section 1016 states with respect to pleas of nolo contendere, "In cases other than those punishable as felonies, the plea and any admissions required by the court during any inquiry it makes as to the voluntariness of, and factual basis for, the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based."

which provides such a plea "may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." The court sustained Figueroa's objections to the intoxication-related facts. Kenyon does not challenge the trial court's evidentiary rulings with the result any contentions about the correctness of those evidentiary rulings are waived and we consider all such evidence to have been properly excluded. (*Lopez v. Baca, supra,* 98 Cal.App.4th at pp. 1014-1015.)

In short, in opposing the summary judgment motion, Kenyon failed to demonstrate any triable issue of material fact on the question of duty and so we address Figueroa's summary judgment motion as a matter of law.

3. *Under this factual scenario, Figueroa did not owe Kenyon a duty of care*.

"An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) "Duty, being a question of law, is particularly amenable to resolution by summary judgment. [Citation.]" (*Parsons v. Crown Disposal Co*. (1997) 15 Cal.4th 456, 465.)

As Kenyon correctly asserts, in general, the rule in California is that "all persons have a duty ' "to use ordinary care to prevent others being injured as a result of their conduct. . . ." ' [Citations.]" (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.)

However, "duty is not an immutable fact of nature but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. [Citation.] Whether a duty of care exists is a question of law to be determined on a case-by-case basis. [Citation.] [Citation.]" (*Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 778, internal quotations omitted.)

The factors courts in California consider to determine the existence and scope of a duty in a particular case were first announced in *Rowland v. Christian* (1968) 69 Cal.2d 108 and reaffirmed by *Parsons v. Crown Disposal Co.*, *supra,* 15 Cal.4th 456.

Rowland set forth a multi-element assessment to determine whether a particular defendant owed a tort duty to a given plaintiff. "These factors include: (1) the foreseeability of harm to the injured party; (2) the degree of certainty that the injured party suffered harm; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant; and (7) the consequences to the community of imposing a duty to exercise care, with resulting potential liability." (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 267-268, citing *Rowland, supra,* at pp. 112-113.)

Analyzing these factors in the context of the undisputed facts here, we conclude Figueroa owed Kenyon no duty to prevent the injury she suffered.

A. *Foreseeability*.

The court's task in determining foreseeability in the context of legal duty, " 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." ' [Citation.]" (*Bryant v. Glastetter, supra*, 32 Cal.App.4th at p. 780, original italics.)

The proper foreseeability inquiry, as it relates to the determination of duty in this case, is whether an accident involving only one driver was likely to result in a later collision between two other cars.[3] "Foreseeability, when analyzed to determine the

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[3] We reject Kenyon's characterization of the foreseeability inquiry. As she describes it: "[i]t [was] foreseeable that two vehicles could collide with each other while attempting to navigate through the hazard," i.e., the "insurmountable dust cloud" created by Figueroa's truck. However, the undisputed evidence shows Garavito was not "navigating" through the smoke at the time; he had managed to pass through the cloud safely and intact, and had come to a full stop for two minutes on the far side of the smoke. Garavito was also able to see back through the "cloud" two minutes later as Kenyon's car advanced. Nor was Kenyon "navigating" through the smoke at the time, because she hit Garavito *beyond* the smoke cloud.

existence or scope of a duty, is a question of law to be decided by the court." (*Ann M. v. Pacific Plaza Shopping Center, supra*, 6 Cal.4th at p. 678, citing *Ballard v. Uribe, supra,* 41 Cal.3d at pp. 572-573, fn. 6.)[4] We conclude Kenyon's harm did not fall within the scope of any duty Figueroa owed.

Bryant v. Glastetter, supra, 32 Cal.App.4th 770, is instructive, Kenyon's insistence to the contrary notwithstanding. There, police stopped and arrested Glastetter on a freeway for driving while drunk. Afterwards, the police called a tow truck to haul away Glastetter's car. (*Id.* at p. 774.) While working to remove the car from the freeway, the tow truck driver was struck and killed by another car. (*Ibid*.) The tow truck driver's family sued Glastetter alleging negligence. (*Id*. at pp. 775-777.)

Applying the *Rowland* factors of duty, the *Bryant* Court held Glastetter owed the tow truck driver no duty of care. The *Bryant* Court explained, " '[t]he general duty owed by a driver of a motor vehicle is . . . . "to exercise reasonable care in driving an automobile down the highway . . . for the protection of the persons or property of others against all of the unreasonable possibilities of harm which may be expected to result from collisions with other vehicles, or with pedestrians, or from the driver's own automobile leaving the highway, or from narrowly averted collisions or other accidents. When harm of a kind normally to be expected as a consequence of the negligent driving results from the realization of any one of these hazards, it is within the scope of the defendant's duty of protection." ' [Citation.]" (*Bryant v. Glastetter, supra*, 32 Cal.App.4th at p. 779.)

With respect to the foreseeability element of duty, the *Bryant* Court held, the harm suffered by the decedent in *Bryant* was not " 'of a kind normally to be expected' as a consequence of negligent driving, such as a collision or narrowly averted collision

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[4] Kenyon is therefore wrong insofar as she asserts summary judgment was improper because proximate cause and foreseeability are questions of fact for the jury. Summary judgment is not precluded merely because she may have demonstrated relevant factual disputes about causation. (*Shively v. Dye Creek Cattle Co.* (1994) 29 Cal.App.4th 1620, 1627.)

involving Glastetter." (*Bryant v. Glastetter, supra*, 32 Cal.App.4th at p. 779.) That is, while Glastetter's drinking made it more probable that the decedent would be at the freeway roadside, the *drinking* itself did not make more probable the accident that did occur, "*which was the result of independent negligence by a third party*." (*Id.* at p. 780, italics added.)

Dyer v. Superior Court (1997) 56 Cal.App.4th 61, which relies on and parallels *Bryant* is also instructive. There, a tow truck driver, called to the roadside because the defendant's car had broken down, sustained injuries when a third party hit the defendant's car. The *Dyer* Court held the defendant did not owe the tow truck driver a duty because the injuries were not a foreseeable result of the defendant's negligence -- if any -- in maintaining his car because, while the negligence brought the tow truck driver to the freeway, it did not make it more probable that a negligent third party would harm him there. (*Id.* at p. 72.)

Likewise, the harm Kenyon suffered was not of a kind normally to be expected as a consequence of Figueroa's negligent driving (if it was negligent), such as a collision or narrowly averted collision *involving Figueroa* (*Bryant v. Glastetter, supra*, 32 Cal.App.4th at p. 779). Garavito's vehicle was stopped *50 yards beyond Figueroa's truck, outside of the smoke.* Thus, while Figueroa's accident did create a cloud of smoke and dust, Figueroa's conduct -- if he was negligent -- did not make it more probable that another negligently-caused accident would occur *beyond* the cloud.

Stated otherwise, in the context of *duty*, there was nothing about Figueroa's accident that compelled Kenyon to speed or fail to pay attention to cars more than 50 yards away. Figueroa's accident itself, occurring at least two minutes before Kenyon arrived on the scene, did not make Kenyon's accident more probable because her collision "*was the result of independent negligence*" on her part. (*Bryant v. Glastetter, supra*, 32 Cal.App.4th at p. 780, italics added; Veh. Code, § 22350 ["[n]o person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having

due regard for . . . visibility, the traffic . . . and in no event at a speed which endangers the safety of persons or property"].)

In contrast to this case is *George A. Hormel & Co. v. Maez* (1979) 92 Cal.App.3d 963, upon which Kenyon relies. In *Maez*, the defendant, who was drunk at the time, lost control of his vehicle and hit a power pole. That accident downed power lines causing a power surge in plaintiff's nearby factory, destroying equipment and causing damages in lost wages. (*Id.* at p. 966.) In affirming the judgment in favor of the plaintiff, the appellate court held that the injury was a foreseeable consequence of the defendant's conduct. "[T]he injury suffered by the plaintiff herein flowed directly from and was a direct and proximate result of the negligence of the defendant. . . . The natural, logical, and foreseeable consequence of striking and destroying a power pole is the disruption of power service to those in the neighboring vicinity." (*Id.* at p. 968.)

This case is unlike *George A. Hormel & Co. v. Maez, supra,* because Kenyon was not harmed by the tree Figueroa hit, or by something that the tree hit. There is nothing in Figueroa's action that compelled Kenyon, who came down Badillo at least two minutes later, to drive inattentively and too fast for the conditions of the road.

B. *The closeness of the connection between the defendant's conduct and the injury suffered*.

"[F]oreseeability is not coterminous with duty." (*Juarez v. Boy Scouts of America, Inc*. (2000) 81 Cal.App.4th 377, 404.) Even with a finding the harm was foreseeable, a court may conclude no duty exists, because of other factors and considerations of public policy. (*Id.* at p. 405.) On that score, the element of the closeness of the connection between Figueroa's conduct and Kenyon's injury -- a factor related to foreseeability (*Bryant v. Glastetter, supra,* 32 Cal.App.4th at p. 781) -- further militates against a finding of duty on Figueroa's part.

" '[T]he considerations that determine whether a defendant was negligent with respect to a plaintiff define the limits of his responsibility. "Almost invariably these cases present no issue of causation in fact, since the defendant has created a situation

acted upon by another force to bring about the result . . . . The question is one of negligence and the extent of the obligation: *whether the defendant's responsibility extends to such interventions, which are foreign to the risk he has created*. It might be stated as a problem of duty to protect the plaintiff against such an intervening cause. . . ." [Citations.]' " (*Bryant v. Glastetter, supra*, 32 Cal.App.4th at p. 781, italics added, quoting from *Mosley v. Arden Farms Co*. (1945) 26 Cal.2d 213, 221 (conc. opn. of Traynor, J.)[5].)

Here, the connection between Figueroa's conduct and Kenyon's injury is indeed remote. Figueroa's negligence -- if there is any, involved swerving to avoid another car. There is no logical cause-and-effect relationship between Figueroa's accident and Kenyon's collision more than two minutes later and 50 yards down the road. (*Bryant v. Glastetter, supra*, 32 Cal.App.4th at pp. 781-782.) Other than the smoke cloud, whose perimeter did not extend to Garavito's vehicle, and through which Garavito had managed to "navigate" without trouble, there is nothing about Figueroa's conduct that connected to Kenyon's intervening acts. That conclusion sets Kenyon's injuries outside the scope of any duty Figueroa may have had.

C. *Moral blame attached to Figueroa's conduct and the consequences to the community of imposing a duty to exercise care*.

As for the final *Rowland* factors of consequence, Kenyon makes much of the fact Figueroa was inebriated while driving that night. While such conduct may be deplorable, there was *no admissible* evidence that Figueroa was inebriated. Rather, the undisputed facts are that Figueroa's accident was caused by a Honda that cut him off. If the reason Figueroa's truck landed against the tree was that he swerved to avoid a Honda, then his conduct in the first instance is not negligent. As a policy matter then, we decline to

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5 Kenyon is mistaken when she asserts the discussion above-quoted from *Mosley* concerns causation rather than duty.

manufacture a duty to prevent two other vehicles from colliding merely because Figueroa attempted himself to avoid an accident.

Even if the court had considered Figueroa's intoxication, we would still decline to conclude that he owed a duty to prevent the subsequent negligence of Kenyon who cavalierly blew through a cloud of smoke at 5 to 15 miles above the speed limit, oblivious to the possible dangers ahead.

To summarize, we conclude the undisputed, extrinsic, observable facts show Figueroa owed no duty to protect Kenyon from injuries resulting from her own negligence. Accordingly, we hold the trial court correctly granted Figueroa's motion for summary judgment.

4. *Summary judgment is not precluded merely because the court granted Kenyon the right to discover Figueroa's financial condition under Civil Code section 3295*.

Finally, we reject Kenyon's contention premised on Civil Code section 3295, subdivision (c). Kenyon contends the trial court's earlier ruling granting her motion to discover Figueroa's financial condition (Civ. Code, § 3295, subd. (c))[6] barred the court from later granting Figueroa's summary judgment motion because the discovery ruling is based on the likelihood Kenyon would prevail on her punitive damages claim. Not so.

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[6] Civil Code section 3295 states in relevant part, "The court may, for good cause, grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for damages pursuant to Section 3294, prior to the introduction of evidence of: [¶] . . . [¶] (2) The financial condition of the defendant. [¶] . . . [¶] (c) No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) unless the court enters an order permitting such discovery pursuant to this subdivision. . . . Upon motion by the plaintiff supported by appropriate affidavits and after a hearing . . . the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294. *Such order shall not be considered to be a determination on the merits of the claim* or any defense thereto and shall not be given in evidence or referred to at the trial." (Italics added.)

Civil Code section 3295, subdivision (c) "concerns a defendant's right to privacy and protection from being forced to settle unmeritorious lawsuits in order to protect this right. It . . . does not implicate the traditional factfinding process or the right to a jury trial in any way. Indeed, section 3295(c) expressly states that an order thereunder '*shall not be considered to be a determination on the merits of the claim* or any defense thereto . . . .' [Citation.]" (*Jabro v. Superior Court* (2002) 95 Cal.App.4th 754, 759, italics added, quoting from § 3295, subd. (c).) Thus, while the court must weigh the competing affidavits in favor of and against the discovery motion and make a finding that it is very likely Kenyon would have prevailed on her punitive *damages claim* (*Jabro v. Superior Court, supra*, at p. 755), such a finding is not a ruling on the merits, and certainly not on the merits of a wholly distinct element of negligence.

Nor does such finding require the court to reach the question of whether Kenyon was likely to prevail on the duty element of her negligence claim. Subdivision (c) of section 3295 of the Civil Code is a discovery statute concerning the *damages portion* of a negligence claim. It involves the question of the likelihood the plaintiff will be able to prove the defendant acted with malice. The plaintiff must make a showing "there is a substantial probability that the plaintiff will prevail on the [punitive damages] claim." (Civ. Code, § 3295, subd. (c).) That Kenyon may be able to prove Figueroa acted with malice under the damages portion of Kenyon's negligence cause of action is irrelevant to the question under the duty element of negligence, namely, whether Figueroa owed her a duty in the first place. "[S]ummary judgment may be appropriate even if there are disputed factual issues; if the defendant's showing negates an essential element of the plaintiff's case, no amount of factual conflict upon other aspects of the case will preclude summary judgment. [Citations.]" (*Shively v. Dye Creek Cattle Co., supra,* 29 Cal.App.4th at p. 1627.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P.J.

CROSKEY, J.